83 - 1806

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THEODORE M. McANLIS

PETITIONER,

v.

UNITED STATES OF AMERICA and
S. LEE RABNEY, Revenue Officer
of the Internal Revenue Service

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REDRESS OF GRIEVANCE

THEODORE M. McANLIS
1918 Ascott Road
North Palm Beach,
Florida 33408
Tel. (305) 626-3212

Appearing in his own
proper person

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court in the enforcement and contempt proceedings, and the appellate court in its decision, so far departed from the accepted and usual course of judicial proceedings as to deny petitioner fair due process of law, and to call for an exercise of this Court's supervisory power?

2. Whether petitioner was improperly denied assistance of counsel in the contempt proceedings which carried a risk of imprisonment?

3. Whether the holding of "harmless error" by the appellate court upon the trial court's initiating the proceeding in indirect civil contempt upon its own motion, is in conflict with the decisions of other courts of appeal, and should be reversed?

4. Whether the appellate court's decision is supported by the record, and whether the language of the decision and the tactics therein, constitute a prima facie case of judicial prejudice?

5. Whether the jurisdictional step described by 26 USC 6001, and the disclosure requirements of the Privacy Act of 1974, 5 USC 552a(e)(3), constitute administrative steps required by the Code in the issuance of an IRS summons, pursuant to the rule established by this Court in US v Powell, 379 US 48, 57-58 (1964), and reiterated in US v. LaSalle National Bank, 437 US 298, 313-314 (1977)?

6. Whether the failure by the IRS to make a jurisdictional determination pursuant to 26 USC 6001, is a fatal jurisdictional defect in these proceedings?

7. Whether a district court is enjoined by the Fourth Amendment to the US Constitution from enforcing an IRS personal summons when the principal summoned invokes the protections against unreasonable search and seizure?

LIST OF PARTIES TO THE PROCEEDINGS

To the best of petitioner's knowledge, the parties to these proceedings are those named in the caption of the case.

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PETITIONER'S AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

My name is Theodore M. McAnlis and I am the petitioner, appearing before this Court in his own proper person. I affirm that I believe that this petition is not frivolous nor lacking in merit and I affirm that the facts presented herein are true and correct to the best of my knowledge and belief.

I have chosen not to appear in forma pauperis. I do not want others bearing the costs of my battle, but I state that the costs of proceeding herein have been a burden upon my resources which are not sufficient to engage licensed counsel. Petitioner stands ready to argue this case orally.

Theodore M. McAnlis, pet.

Affirmed before me this
_____ day of April, 1984.

Notary Public

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APRIL 5, 1985

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REDRESS OF GRIEVANCES

The petitioner, Theodore M. McAnlis, appears in his own proper person and requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered in combined cases on December 12, 1983. Petitioner requests that the Court consider this also as a petition for redress of grievances pursuant to the First Amendment to the United States Constitution.

OPINION BELOW

The Court of Appeals, on December 12, 1983, entered its decision on combined cases No. 82-5543 and 82-5750, affirming an order of the United States District Court for the Southern District of Florida, enforcing an IRS administrative subpoena (form 2039-A summons) issued to the petitioner, and affirming a subsequent conviction for civil contempt. Ref. 721 F2d 334.

The appellate court denied the petitioner's (McAnlis') petition for rehearing and petition with suggestion for rehearing en banc on January 24, 1984. The mandate issued on March 26, 1984.

The decision is attached as Appendix A, and the order denying rehearing is attached as Appendix A-6.

JURISDICTION

The date of the decision sought to be reviewed is December 12, 1983, and the order denying rehearing is dated January 24, 1984. Jurisdiction is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS

Amendments to the Constitution of the United States:

> Article I. ". . and to petition the government for a redress of grievances."
>
> Article IV. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated."

Article V. ". . nor shall any person be deprived of life, liberty or property, without due process of law;.."

Article VI. "In all criminal prosecutions, the accused shall enjoy the right . . to have the assistance of Counsel for his defence."

Article IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

STATUTES

United States Code.

Title 26, Section 6001: NOTICE OR REGULATIONS REQUIRING RECORDS, STATEMENTS AND SPECIAL RETURNS.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns and comply with the rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgement of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title.

Title 26, Section 7601: CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax . . .

Title 26, Section 7602: EXAMINATION OF BOOKS AND WITNESSES.

The Secretary is authorized - -

(2) to summon the person liable for tax . .

Privacy Act of 1974.
Title 5, subsection 552a(e)(3)

Each agency that maintains a system of records shall -

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual -

(A) the authority (whether granted by statute or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection;

(D) the effects on him, if any, of not providing all or any part of the requested information;

STATEMENT OF THE CASE

On July 1, 1981, IRS revenue officer Rabney issued a personal summons to the petitioner, requiring him to appear July 15 and give testimony and produce documents "reflecting the receipt of taxable income for the years 1977, 1978 and 1979" (R 5).

McAnlis challenged the validity of the summons by letter of July 9, 1981, objecting to the threatened infringement on his rights secured by the Constitution (R 37-38).

The government did not respond to the challenges or objections.

In November, the government petitioned the district court for enforcement with agent Rabney's declaration supporting the petition. Service was effected with an order to show cause on January 28, 1982. (R 1-7).

McAnlis answered the petition with supporting affidavit and motion to dismiss (R 27-43). The answer denied the government's allegation that it had followed the administrative steps required by the Code and identified the jurisdictional step described in 26 USC 6001 and the Privacy Act disclosure requirements as steps not taken.

The answer denied the existence of documents reflecting the receipt of taxable income, and raised affirmative defenses that the government had failed to respond administratively and had no cause to bring before the court, that McAnlis was not a person liable for tax for the years in question and thus could have no "tax liabilities" to investigate, and that the government had made no showing of administrative jurisdiction.

The government made no response to the affirmative defenses.

A show cause hearing was held on February 17, 1982. No testimony or evidence

was entered on the record. The court was informed that an answer and motion to dismiss had been filed, and the court continued the hearing for an unspecified time in order to review McAnlis' defenses and motion. (3S 28-41 transcript). McAnlis filed with the court a memorandum of law supporting his answer, affirmative defenses and motion (4S 1-11).

Comments made by the court at the close of the hearing caused McAnlis to fear that the court intended to enforce the summons without benefit of a trial on the facts, so following the hearing, McAnlis filed a motion for an evidentiary hearing (R 62-63).

The court did not reconvene the hearing but instead on March 3, 1982 issued another order to show cause (R 66-68, 72) requiring McAnlis to appear before the IRS on March 30th or before the court on April 9, 1982.

The order denied all outstanding motions. Agent Rabney served the order on March 22nd, and on March 23rd McAnlis filed

and served interrogatories on the IRS with a motion to shorten the time for response since only 16 days remained to the date of the show cause hearing. The government did not respond to the interrogatories. (R69-71).

On March 30, McAnlis made a voluntary appearance before the IRS and arranged for a court reporter to be present. (R 78-92). McAnlis agreed to answer Rabney's questions if Rabney would respond to the challenges. Rabney refused and terminated the meeting when asked for his statutory authority (R 87). McAnlis appealed to Rabney's group manager to no avail and was refused a further appeal and ordered out of the building.

McAnlis filed another motion to dismiss on April 7th (R 73-92) renewing his jurisdictional challenges to the summons and reraising his defenses.

McAnlis inquired of the trial judge's secretary as to whether a hearing would be held. None was scheduled, but the secretary called the US Attorney and informed McAnlis that a hearing was requested.

A second show cause hearing was held on April 9, 1982. At the start of the hearing, the trial judge delivered a blanket order denying all outstanding motions (R 166). The order contained no findings of fact or conclusions of law related to the issues in controversy.

McAnlis objected to the government's failure to answer his interrogatories and after presenting argument, obtained the court's agreement to put the agent on the stand to answer.

Rabney took the stand and under direct examination by McAnlis, revealed that he had issued the summons for an improper purpose, i.e. to determine whether McAnlis was a person liable (2S 34). To the question "What was the first administrative step required by the Code that you took?", Rabney replied, "I am lost by your question". (2S 52). Rabney later testified that the first step was "I received the case issued to me." Rabney admitted to no knowledge of the disclosure requirements of the Privacy Act of

1974, and stated that the notice would not be on the summons unless printed on it (2s 56). This Court shall take judicial notice that the summons contained no Privacy Act notice.

Following the interrogatories, McAnlis summed up his position in support of his arguable showing, challenging Rabney's allegation in his declaration that all the administrative steps required by the Code had been taken and identifying section 6001 as describing the first jurisdictional step required in issuing a summons, and noting that the disclosure requirements of the Privacy Act of 1974 were not part of the summons.

McAnlis then informed the court that he was asserting his Fourth Amendment protections of his papers and effects.

The court enforced the summons without further proceedings. Thus, the government was not required to establish a prima facie case for enforcement, and McAnlis was denied an opportunity to hear the government's evidence in support of enforcement and was de-

nied an opportunity to refute the government's case. The court referred to the taking of interrogatories as an adversary proceeding, but no trial on the facts in controversy was had.

McAnlis informed the court that he intended to appeal and moved for a stay. The court requested the motion in writing. The court issued a written order (R 93-94) reflecting its oral order enforcing the summons. The order did not address the jurisdictional question, the disputed allegation that the administrative steps had been followed, or the government's failure to address the challenges administratively, and the order contained no findings of fact or conclusions of law in support of the decision.

McAnlis moved for a stay (4S 13-20). The court, on a motion for reconsideration, granted a 6 day stay, delaying the compelled appearance at the IRS from April 16th to April 22nd. McAnlis moved for an enlargement of time through pendency of appeal. The court denied this motion on April 21.

McAnlis decided to appear on April 22 and testify over a jurisdictional objection. McAnlis appeared and arranged for a court reporter to record the IRS proceedings (R 108-129). At the close of the conference, agent Rabney claimed that McAnlis had not complied and stated that he would see McAnlis in court (R 127-128). No other notice was given McAnlis of the proceedings.

A civil contempt hearing was held at 2:00 PM the same day, April 22nd. The trial court initiated the hearing upon its own motion. No charges specifying the particulars of the contempt charged were introduced by the government. (S 1-31 transcript).

The court questioned McAnlis briefly asking if he had appeared and produced any documents. McAnlis stated that he had appeared, and that the agent had not asked for any documents that he had. The court put Rabney on the stand and instructed the US Attorney to begin direct examination.

McAnlis requested time to get counsel but was denied his request. He moved for

time to review the IRS conference transcript so that he might prepare his defense, but was denied his request. (S 9-10).

During direct examination of Rabney, the trial judge participated in the questioning and at least on one occassion (S 8) the trial judge asked a leading question of the witness that led to an incorrect answer.

The Court: Which (questions) did (McAnlis) answer yes to?

Rabney: No. He did not answer yes to any of them.

The Court: None of them. Some of them he said no to, and others, he attacked the jurisdiction?

Rabney: Right.

The transcript of the IRS conference shows that McAnlis made jurisdictional objections to questions but answered over his objections. The trial judge's questioning led the witness into an incorrect answer.

The hearing transcript indicates that the court was most concerned about whether McAnlis produced the documents mentioned in the summons (S 9).

The Court: Did you ask him to specifically produce any of the records mentioned in the summons?

Rabney: Yes. . .I read from the summons where it said to produce these items.

The Court: Did he hand you anything?

Rabney: He did not produce anything.

During cross-examination of Rabney, McAnlis attempted to raise a defense of substantial compliance. (S 18).

McAnlis: Did I not say to the best of my knowledge and belief I had none?

Rabney: Yes.

McAnlis: Isn't that how I answered most of the questions?

Rabney: Most of them.

McAnlis: But not all of them?

Rabney: Not all of them.

McAnlis: which questions didn't I answer that way?

Rabney: I don't recall at this point.

McAnlis: If I answered all of your questions and if you didn't ask for any documents that I had, how have I not complied here?

Rabney: You brought no records at all.

McAnlis: You have personal knowledge that I brought no records in?

Rabney: No. I don't.

McAnlis: Did I refuse to produce any documents?

Rabney: You didn't produce any documents.

McAnlis: Did I refuse to produce any documents?

Rabney: I really don't know whether you refused to produce any documents.

McAnlis: Did you ask me the question, are you refusing to produce any documents?

Rabney: No. . . I asked you according to the summons, and the summons said produce these documents.

McAnlis: Did I refuse to produce any documents?

Rabney: Not to that specific question.

Following the cross-examination, the court asked McAnlis to relate his version. McAnlis asked for a short recess, but his request was refused, the court stating, "Well, we don't have two minutes. Let's go ahead. It shouldn't take you long to think about what you did"(S 24).

The court conducted an examination of McAnlis. (S 25).

The Court: All right. What was your answer?

McAnlis: My answer in most cases was in reply to his question that did I have this document, or that document, was that I had none.

The Court: No documents?

McAnlis: No documents.

The Court: (S 26) What are the ones in which you did have documents, and what were your replies to those questions?

McAnlis: To be very honest, I am not sure I recall. . . .Actually, I don't recall a lot about the conference. It was a pressure-filled situation.

The Court: Well, neither one of you recall very well, I might say.

After some discussion of the jurisdictional challenge, the court asked the US Attorney what he thought should be done.

The US Attorney replied that it was the position of the government that McAnlis was in civil contempt. (S 28).

The court gave McAnlis no opportunity for rebuttal but convicted McAnlis of civil contempt and imposed a civil fine of $50 per day until the contempt were purged by "reporting to the IRS office and . . making disclosures that are required in order to determine whether or not you should have filed tax returns in the years in question." (S 28).

The court's written order (R 93-94) limited the period of the accumulating fine to five days after which McAnlis would be arrested and put in jail.

On April 23, 1982, McAnlis filed a notice of appeal on the enforcement order. He also filed a motion for clarification of the contempt order and a motion for a stay of enforcement pending appeal (R 136-141).

On April 26th, the date of the court's written order, McAnlis filed an affidavit to purge the contempt with a motion to vacate and a supporting brief (R 103-134). The affidavit amended answers McAnlis made at the IRS conference and in sum affirmed that he had no documents to produce that reflected the "receipt of taxable income" for the years in question.

On April 27th, the court denied the motion to vacate and the motion for a stay stating that the affidavit was "inappropriate for the purpose of purging the contempt." (R 144).

On April 28th, McAnlis, acting upon the advice of an attorney, filed a motion for relief from contempt, making a Fifth Amendment objection to further testimony.

On April 29, 1982, McAnlis tendered a money order to the United States government for the civil contempt fine of $250. The money order was tendered under protest and duress and with reservation of rights.

On June 18, 1982, McAnlis filed a notice of appeal of the contempt order, and on June 28th, the court denied his motion for relief from contempt of April 28, and stated that McAnlis continues to be responsible for a fine of $50 per day until the contempt is purged.

McAnlis filed a motion for a stay of imposition of sanctions on July 2, 1982. McAnlis heard nothing from the court on the motion for two weeks, and on July 15th, acting upon the advice of his attorney, McAnlis scheduled a conference with Rabney for the purpose of purging the contempt.

McAnlis appeared at the IRS office on July 19, 1982, with a court reporter. The conference began with Rabney interrupting McAnlis in his attempt to make an opening statement. Rabney began asking questions two at a time, and when McAnlis raised an objection, Rabney abruptly ended the conference. McAnlis attempted to continue, but Rabney informed him that he, Rabney, was not taking any answers and ordered McAnlis out of the building. (3S 21-22, transcript).

On the same date, the court denied the motion for a stay on the grounds that it felt the appeal was "frivolous".

On July 21st, McAnlis moved for relief from contempt on the grounds that the IRS had refused McAnlis an opportunity to purge and that Rabney had obstructed justice.

On August 17th, the court denied relief stating that McAnlis "had not taken any of the acts necessary to purge the contempt." (3S 42). McAnlis made no further appearance at the IRS but pursued his appeal with the

Eleventh Circuit Court of Appeals.

On July 15, 1982, the government had moved to consolidate the enforcement and contempt appeals, and the appellate court granted the motion.

On September 1, 1982, McAnlis filed a motion for a stay of imposition of sanctions with the appellate court. The government opposed, and the court denied the stay on October 12, 1982.

On October 20th, McAnlis filed a motion for declaratory judgement and for censure of the US Attorney on the grounds that the US Attorney had deliberately misstated facts in his/her opposition to McAnlis' motion for a stay, and had done so for the purpose c prejudicing McAnlis before the court. This motion was denied by the appellate court on December 1, 1982.

After filing of the government's answer brief in the combined cases, McAnlis, on March 24, 1983, filed a motion to strike the government's brief on the grounds that

the brief contained irrelevant and scandalous matter included for the purpose of casting McAnlis in a derogatory light and containing criminal accusations improper in a civil proceeding. The US Attorney had accused McAnlis of "failing to file tax returns" and further accused McAnlis of refusing to comply with the summons or the trial court's order. All of these accusations were unsupported by the record.

The appellate court did not rule on this motion but carried it with the case.

The court granted oral argument in the case on September 27, 1983. During oral argument, the US Attorney again slandered McAnlis by the accusation that he "failed to file tax returns for the years in question."

McAnlis filed a motion to strike this scandalous language from the record on the grounds that it was irrelevant, improper and not supported by factual allegations nor evidence on the record. The motion was filed October 5, 1983. The court denied this motion on October 19, 1983.

ORIGINAL JURISDICTION

Jurisdiction of the District Court was invoked by the government pursuant to Title 26, sections 7402(b) and 7604(a).

This jurisdiction is now called into question by the challenge to the IRS's jurisdiction to issue the summons.

CAUSE FOR GRANTING THE WRIT

The questions presented for review are questions of rights, of proper administrative procedures under the revenue laws, of alleged prejudice apparent in a decision of a court of appeals, of unfair due process, denial of counsel, conflict with decisions of other courts of appeal, and a question of want of jurisdiction.

These are important questions that meet the prerequisites and character of issues falling under the meaning of Rule 17, Rules of the Supreme Court, and for which this Court has granted certiorari in the past.

The questions presented meet criteria adopted for prior grants of certiorari:
The decision conflicts with that of other courts of appeals, Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 US 426; Caminetti v. US, 242 US 470;
The proceedings depart from the usual course of judicial proceedings, US v. Rizzo, 297 US at 533;

Important questions are raised regarding the administration and jurisdiction under revenue laws, Cammarano v. US, Wash., 358 US 498; Worth Bros. Co. v. Lederer, 251 US 507; The appellate decision was based in part upon grounds not presented, V. L. Letulle v. Frank Scofield, 308 US at 416; An important question is raised - that of alleged prejudice of a panel of the appellate court, and this Court has granted certiorari on grounds of the importance of the question, Schall v. Camors, 251 US 239; Toledo Newspaper Co. v. US, 247 US 402.

Petitioner charges that the nature of the appellate court decision points the way to abuse of judicial power in tax-related cases, which if allowed to fester and grow could lead to a practice of tyranny in the lower courts that is the antithesis of the foundations of this republic.

> Due process is that which comports with the deepest notions of what is fair and right and just. Solesbee v. Balkcom, 339 US 9 (1950)

ARGUMENT

The petitioner argues that this case involves important questions of the government failing to follow the rules of due process beginning in the administrative arena and continuing through the enforcement, contempt and appellate process.

Petitioner argues that this case meets the conditions and requirements that in the past have been cause for granting of certiorari.

Petitioner has been damaged, having been compelled under threat of imprisonment to tender a civil contempt fine of $250.00, a copy of the receipt for which is attached as Appendix D.

Regarding the abuse of due process in the trial court, the record speaks for itself. In raising his defenses to the summons, McAnlis relied upon the rules established by this Court in US v. Powell, supra, that issue being whether the administrative steps required by the Code had been followed.

While McAnlis raised other defenses,

it was this issue along with the failure of the IRS to address the challenges administratively, that the trial court ignored.

Although there were facts in controversy, the trial judge refused to recognize those issues and enforced the summons without a trial on the facts. It was the rule established by this Court in Powell, supra, that the government bears the initial burden of showing that the elements of good faith have been met. In that case, the prima facie case was established through testimony of the agent. This is the accepted and usual course of judicial proceedings, and this is the course from which the trial court departed in this case. See US v. Euge 444 US 707.

This procedure was dealt with specifically by the Ninth Circuit in US v. Goldman, 637 F2d 664, 668 (9th Cir, 1980).

> The district court properly accepted agent Rouleau's allegations of relevance as a prima facie showing adequate to call for the hearing . . (Goldman's) challenge marked the first point at which the government was put to its true burden of establishing relevance.

Thus, we have a rule established by this Court that was essentially ignored in the trial court's proceeding. This departure was sanctioned by the appellate court in its decision which did not even recognize the existence of an arguable showing but held (at 336, h.n. 3) that a letter written four months before the start of the enforcement actions was insufficient to defeat enforcement. No mention was made in the decision that McAnlis had answered the petition and set the IRS's allegations at issue.

In the contempt proceedings the trial court also departed from the accepted and usual course of proceedings. The record establishes and the government and even the appellate court admits that the trial court initiated the proceedings upon its own motion (at 337, h.n 6-8). Literally all precedent among the circuits holds that a trial court has no lawful authority to do so. McNeil v. US, 236 F2d 149, 153-154 (1st Cir, 1956); US v International Union, Etc., 88 US App DC 341, 190 F2d 865, 873 (1951);

Lasky v. Quinlan, 558 F2d 1133 (2nd Cir, 1977); Palmigiano v. Garrahy, 448 F Supp 659 (1978) (a district court case).

The government admitted in its answer brief (at 3Br 23) that a contempt proceeding is initiated by a petition for an order to show cause. Here there was no petition and no order to show cause. The trial court lacked lawful authority to proceed, and as the Court of Appeals, DC pointed out in Washington Metro. A.Tr.Auth. v. Amal.Tr.Union , Etc., 531 F2d 617, 622 (1976):

> The district court had no jurisdiction to enter a final contempt judgment against (the defendant) in the absense of a motion to that effect by the plaintiff. * * The effective waiver of the complaintant's interest removes the legal basis of imposition of civil contempt.

To the best of petitioner's knowledge, this is an original question with regard to this Court.

The record shows that McAnlis was denied proper written notice of the alleged contempt specifying the particulars of the contempt charged. This Court has held on many occa-

sions that written notice specifying the particulars of the contempt charged is the minimum requirement of due process. Cooke v. US, 267 US 517, 536; Harris v. US, 382 US 162, 164; Johnson v. Mississippi, 403 US 221; Gompers v. Buck's Stove & Range Co., 221 US 418; Brown v. US, 359 US 41.

McAnlis was denied time to prepare a defense. The contempt hearing followed the IRS conference by only one hour. McAnlis was never informed of the particulars of the contempt charged, and no charges were identified at the hearing. Practically speaking, McAnlis had to formulate his defense as the proceedings progressed, and the testimony of the agent revealed where the allegations lay. Several of the cases cited above point out that an alleged contemnor must be afforded a fair opportunity to prepare a defense. That includes sufficient time.

McAnlis twice requested time to obtain counsel to assist with his defense. The trial court denied him counsel. Since the trial court had on two occasions warned

McAnlis that he could be put in jail, the proceedings obviously carried the risk of imprisonment. It is well settled in rulings by this Court that denial of counsel is an automatic reversal. Re Petition for Green, 369 US 689; Re DiBella, 518 F2d 955 (2nd Cir).

Finally, there is the matter of the evidence supporting conviction. The government in its answer brief admits that the evidence must be clear and convincing (3Br 24). The evidence here would not seem to support the conviction. The only evidence entered was the testimony of Rabney. Under direct examination Rabney testified that McAnlis had appeared and testified over a jurisdictional objection. Under cross-examination, Rabney reluctantly admitted that McAnlis did not refuse to produce any documents. Where is the clear and convincing evidence?

Petitioner asserts that the facts of the case establish a course of judicial proceedings so departing from the accepted and usual and so abusive of fair due process,

that a review by and an exercise of this Court's power of supervision is called for within the measure of Rule 17.

Petitioner now turns to the proceedings on appeal in the Eleventh Circuit and the nature and character of the decision affirming the trial court's orders.

The record establishes that the decision is replete with errors of fact. The first error of fact is contained in the summary of facts (at 336) wherein the decision states that McAnlis had consistently refused to produce documents. On the contrary, no refusal to produce documents is upon the record. McAnlis had challenged the summons, and until that challenge was settled administratively or adjudged, he had no obligation to produce documents. The Fifth Circuit, which law is the law of the Eleventh Circuit, in US v. Harris, 628 F2d 875, 879 (1980), held that a summoned party may refuse even to appear if he intends to challenge the summons for lack of good faith on the part of the IRS.

The second error of fact, ibid, is the statement that McAnlis failed to bring requested records when he appeared before the IRS on March 30, 1982. In fact, the question never arose in the proceedings since Rabney abruptly terminated the conference when McAnlis asked for his statutory authority. One might impute to Rabney's behavior the knowledge that he had no authority. (R 85).

A third and flagrant error of fact in the summary, ibid, is the statement that McAnlis had been held in contempt on April 22, because he had failed to produce the required information or explained his failure to do so on April 16. The record clearly shows that the compelled appearance on April 16 was stayed by the trial court until April 22, when McAnlis did appear at the IRS and testified over a jurisdictional objection. (Stay at R 100).

In its discussion under item I., the appellate panel substitutes two of its own issues for the issues that McAnlis raised on appeal, issues (2) and (3) (at 336).

This Court has held substitution of grounds is by itself sufficient cause for the grant of certiorari. V. L. Letulle v. Frank Schofield 308 US 415, 416 (1939).

The issues substituted by the panel were (2) the IRS did not have the right to summons (McAnlis') records as it had no basis on which to assume he is a person liable to pay taxes; and (3) the IRS must prove the existence of tax liability prior to the issuance of any summons.

The relevant issue raised (1Br 38-48) was that the IRS had failed to follow the administrative step required by the Code described in section 6001, to make the inquiry as to whether McAnlis was a person liable for tax, before it summoned him pursuant to section 7602 as a person liable. This was a challenge pursuant to the good faith rule established by this Court in US v. Powell, supra.

The second issue invented by the panel and upon which the decision was in part based, was never raised. In fact, McAnlis

specifically denied raising this issue in his reply brief (4 Br 12) when the government in its answer brief made the same substitution. Such a claim would be ludicrous since the purpose of a summons is to acquire information for the purpose of determining a tax liablity or collecting one. If the IRS had to prove the existence of a tax liability before it could summons the information needed to determine the existence, section 7602 would be self-defeating.

Some further discussion of the administrative steps is warranted. First, one will learn from an examination of the IR Code, that the terms "liability" and "liable" are precisely distinguished as used in the Code.

"Liable" always relates to the state of the person, as in "person liable" (6001, 7602), "person is liable" (6001), "person who may be liable" (7601), "person made liable" (6011).

"Liability" always refers to an amount of tax owed, as in "liability of any person

. . or in collecting any such liability" (7602), "liability for taxes withheld" (7501), "matter of the tax liability" (form 2039-A summons).

The determination of a person being a "person liable" must come prior to the computing of a "tax liability", for the precise and unambiguous wording of section 7602 authorizes the summoning of "the person liable".

One can then list in logical order the administrative steps required by the Code in the issuance of a summons.

1. 7601 The Secretary may cause employees of the Treasury to canvass the districts and "inquire after any persons who may be liable to pay an internal revenue tax."

2. 6001 The Secretary may by notice or regulation require any such person by statement or special return to furnish limited information for the specific purpose of determining whether that person is "a person liable to pay any internal revenue tax".

3. 6001 If that person is determined to be a person liable, the Secretary may re-

quire the person liable to render statements or returns as the Secretary may prescribe and to comply with the rules and regulations prescribed by the Secretary.

4. For the purpose of computing a tax liability or collecting such liability, the Secretary may "summon the person liable", or any third-party recordkeeper of the person liable, or any other person deemed necessary to the investigation of the person liable.

Thus, once a person is found who may be liable, the first administrative step required by the Code in issuing a summons to a person liable, is the jurisdictional step described in section 6001, of requesting the information and making the determination of whether or not such person is a person liable.

Thus, when agent Rabney testified that he issued the summons "for the person to come in so that we could determine whether he is in fact liable . ." (2S 34), he was admitting to an unauthorized use of the summons.

That this question of administrative steps is an important question is evidenced

by the fact that neither the trial court nor the appellate court dealt with it, the trial court ignoring the issue and the appellate panel substituting issues.

The appellate panel in effect erected a strawman and knocked it down, stating (at 336, h.n. 4) "McAnlis' second and third contentions are also frivolous."

The problem is that the second and third contentions were the panel's own and not those of McAnlis.

The decision goes on to state, "The IRS had a basis upon which to assume McAnlis was liable to pay taxes. McAnlis' failure to file tax returns for three years provided that basis."

Here we come to the fifth error of fact and the crux of the decision. Upon what evidence or facts has the panel determinied that McAnlis should be adjudged a criminal, a "taxpayer who failed to file tax returns"?

Can the panel have made this judgment upon the basis of some inference?

If so, what facts formed the basis of that inference? It is a well-settled principle of law that an inference can be drawn only from a factual premise established by proof. 29 AmJur 2d 196. Where are those facts established by proof? The government sat silent in the show cause hearing. No evidence was entered by the government.

A second question arises? Where is the evidence that McAnlis had an obligation to "file tax returns for three years"? If the panel has determined by inference that he had an obligation, where are the facts established by proof that support that inference?

There are no such facts in the record! McAnlis in fact, in his original defense to the petition for enforcement, established the position that he was not a "person liable".

His position was supported by his factual assertion that he was a natural, unenfranchised person not knowingly requesting or exercising a privilege, and his legal basis was explained in his memorandum of law (4S 10).

The appellate panel has based its decision upon fictions, substituting its own issues for those actually presented on appeal, and justifying its holdings by an unsupported inference, or perhaps double inference, which amounts to a scandalous attack upon the petitioner.

The sixth error of fact and the first apparently arbitrary holding that the panel presents (at 336, h.n. 3) is that McAnlis' letter of July 9, 1981, "fails to establish . . that enforcement of the summons constitutes an abuse of the court's process". The panel holds that the IRS had fulfilled its initial burden of its good faith showing.

Two questions arise. What facts did the panel rely upon to determine that the IRS met its initial burden? We are not informed. What relevance has the letter of July 9?

The panel has confused that first issue raised by McAnlis, that the IRS had not exhausted its administrative remedies before seeking judicial enforcement of the summons, with the enforcement proceeding itself.

McAnlis' letter of July 9, 1981 was written four months prior to the comencement of the enforcement proceedings. How can the panel hold that this letter was not sufficient to rebut the IRS's initial showing of good faith made four months after the letter was written? And why has the panel completely ignored the existence of McAnlis' answer to the petition and his defenses raised therein?

The letter was never intended to rebut an initial showing supporting a petition for enforcement that did not yet exist. The panel's ruling defies logic, and in the kindest of terms, can be described only as suspect.

The seventh error of fact (at 337 h.n. 5) lies in the panel's holding that compliance with the Privacy Act of 1974 is not a prerequisite to the enforcement of an IRS summons. McAnlis never raised that issue. The issue was whether the disclosure provisions of the Act were required on the summons and whether the summons was invalid if

it did not include a Privacy Act Notice?

In its holding, the panel relies upon US v. Wills, 475 F Supp 492, 494 (MD Fla, 1979). This Court shall take judicial notice that the Wills case dealt with the Financial Privacy Act of 1978, not the Privacy Act of 1974.

The panel goes on to state that McAnlis suffered no prejudice by failing to receive a Privacy Act Notice. How does the panel reach this conclusion? Upon what facts does it rely? We are not told.

The panel does raise an interesting point. Must an affected citizen prove prejudice before he can expect an agency of government to comply with an act of Congress? And, of course, the controversy brought before this Court, stated in different terms: Did Congress intend that IRS requests for information be exempted from the provisions of the Privacy Act of 1974 and its disclosure requirements?

The panel holds that enforcement of the summons does not violate McAnlis' Fourth

Amendment rights. The panel relies upon US v. Roundtree, 420 F2d 845, 847-850 (5th Cir, 1969). Roundtree holds that an enforced summons is at least legally equivalent to a warrant. Petitioner, however, relies upon the rules established by this Court in Boyd v. US, 116 US 616 (1886). Boyd is often relied upon for the application of the Fifth Amendment protections. The Boyd Court, however, dealt primarily with the Fourth Amendment. At 622:

> The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws - is such a proceeding for such a purpose an 'unreasonable search and seizure" within the meaning of the Fourth Amendment . .?

The Boyd Court then examines the history of the Fourth Amendment and concludes, at 634-635:

> . . .and we are further of the opinion that a compulsory production of the private books of the owner of (property) sought to be forfeited . . . is the equivalent of a search and seizure,

> and an unreasonable search and seizure, within the meaning of the Fourth Amendment.

At 631-632:

> And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

While the Boyd rules have been hedged about for certain circumstances, there yet exists that protected zone of privacy for a citizen's papers and effects that the Boyd Court thought to be so necessary to the preservation of liberty under law. Petitioner has asserted his Fourth Amendment protections here and calls upon this Court to defend his rights guaranteed by our Constitution.

The panel holds finally, that the IRS exhausted all of its administrative remedies, and enforcement does not violate the exhaustion of remedies doctrine.

Here is yet another arbitrary, unexplained holding. Where are the facts? How did the IRS accomplish this exhaustion? Since the IRS did nothing administratively, one might be forced to conclude that the appellate panel had no choice but to make its holding arbitrary.

In the contempt issues presented, there is only one significant error. The panel asserts (Item II,337) that (5) McAnlis claims that the contempt CHARGE was based on insufficient evidence.

McAnlis claimed that the contempt CONVICTION was based upon insufficient evidence. There simply was no contempt charge brought. There exists in the record only the agent's comment "I hope you understand that I believe that you have not complied with the summons at this point". (2R 20).

In its holding (h.n. 13-14) the panel opines that the contempt charge was based on sufficient evidence. What about the contempt conviction? This is the only question with any relevancy. What is that evidence

that must be clear and convincing? Petitioner alleges that it does not exist, and that is why the panel avoided the pertinent question of the contempt conviction.

Next lies the panel's holding of "harmless error" regarding the trial court's initiating the civil contempt proceedings upon its own motion. That it did so is not even disputed. As previously pointed out, literally all precedent holds that a trial court has no authority to initiate such proceedings (page 29, ibid); however, the panel alleges that McAnlis suffered no prejudice. Petitioner disagrees.

Harmless error is that error that does not deprive a litigant of substantive rights. Black's Law Dictionary, page 641. All precedent and the question of the trial court's jurisdiction to proceed aside, the trial court's initiating the proceedings upon its own motion relieved the government of the requirement of bringing the action by petition and notice specifying the particulars of the contempt charged. The trial court's

actions, therefore, deprived McAnlis of such notice and deprived him of a fair opportunity to prepare a defense, both minimum requirements of fair due process. McAnlis' substantive rights were violated by the trial court's error, and such error cannot be held to be harmless.

Regarding the question of notice, the panel admits that an individual needs adequate notice and time to prepare a defense. (h.n. 11-12). The trial court's order enforcing the summons set a tentative time for a contempt proceeding two hours after the start of the IRS conference. McAnlis, after the IRS conference concluded, had about one hour to prepare. During that time the government served no notice upon him and brought no charges against him. In substance, therefore, McAnlis had no time to prepare a defense, but deprived of his right to counsel, had to "wing it" on the courtroom floor.

The panel identifies no facts pertaining to that adequate notice or the

time he had to prepare his defense. The panel once again presents an arbitrary holding as far as the facts are concerned. The panel's conclusion is especially interesting:

> "After reviewing the facts, we find that McAnlis had adequate notice and and time for preparation of his defense. The trial court, therefore, gave him sufficient notice of the contempt proceedings."

This statement can be summarized: McAnlis had adequate notice, therefore, he had sufficient notice. This statement would appear to be an example of circular reasoning, defining a term by its own synonym. The other point is, of course, that it was not the trial court's place to be giving McAnlis notice of the proceedings if in fact it did give such notice. The government had that burden. If, arguendo, the trial court did give McAnlis notice, that notice could have been only the trial court's order of April 9, enforcing the summons and setting a tentative time for a contempt hearing. Could that notice,

written as it was 13 days prior to the IRS conference, have given McAnlis the particulars of the contempt charged as due process requires?

The panel does cite some precedent to justify its conclusions. It is necessary to compare the facts of these cases with the instant case. In re Brummitt, 608 F2d 640, 642-643, (5th Cir, 1979), concerns an alleged contempt for refusal to testify before a grand jury. Here the government filed a suggestion of contempt with the court, and a hearing was held about two hours after the grand jury appearance. The appellate panel held that under the circumstances, two hours was not sufficient time to prepare a defense. Brummitt was represented by counsel. The appellate court mentions a second alleged contemnor (at 643) by the name of Scarborough who had refused to testify under a grant of immunity. He was brought before the court for the second time and the court ordered the government to prepare a suggestion for contempt. Would

that not have been the proper procedure here? The government prepared the suggestion and Scarborough, represented by counsel, was back before the court the next morning. The appellate court, while remanding on a different grounds, commented that even over night, counsel had little time for preparation.

In re Grand Jury Proceedings, 559 F2d 234 (5th Cir,1977), involves another case of refusal to testify before a grand jury. Here the appellate panel holds that one hour was sufficient time; however, the facts of the case reveal that before the hearing the alleged contemnor filed an affidavit with the court stating that he would not testify even if granted immunity and outlined his defenses to any possible contempt charge. These facts are hardly relevant to this case.

The government argued in its brief and during oral argument that McAnlis had several days from the enforcement order until the IRS conference and thus had ample time to prepare a defense since he knew what he was going to do. The US Attorney implies

that McAnlis was bent upon committing premeditated contempt. This Court shall take notice that McAnlis arranged for a court reporter to record the IRS proceedings and made the transcript part of the record (R 108-129). If McAnlis were bent upon premeditated contempt, would he have made arrangements to record the evidence to prove himself guilty?

The panel's holds (at 337, h.n. 6-8) that McAnlis' affidavit was insufficient to purge him of the contempt charge, pointing out that an alleged contemnor bears the burden of proving inability to produce the requested information.

The panel seems to treat the affidavit as McAnlis' defense foundation at the hearing. The affidavit, however, was filed with the court 4 days after the hearing. Two things seem to be occurring here. The panel treats McAnlis' defense at the contempt hearing as that of inability to comply. The defense attempted, however, was that of substantial compliance, Magio v. Zeitz, 333 US 56 (1948).

(Substantial compliance is an appropriate defense to contempt). The defense was: McAnlis appeared, testified over a jurisdictional objection (to protect his standing on appeal), and did not refuse to produce any of the documents requested, answering that he had none. So testified agent Rabney.

The affidavit was submitted to clarify answers to Rabney's questions that required conclusions of law be drawn in making the answers. The affidavit in sum stated again that McAnlis had none of the documents requested. The affidavit was supported by a brief discussing the conclusions of law necessary to the responses. (R 103-134). The affidavit, filed 4 days after the hearing could not have been the basis for a defense at the hearing as the decision seems to imply.

The panel relies upon McPhaul v. US, 364 US 372, 379 (1960), and US v. Hankins, 565 F2d 1344, 1351-52 (5th Cir, 1978). The facts of these cases do not apply. In

McPhaul, the trial court had made a judicial determination that the requested documents existed and were in the defendant's control. The defendant had never advised the subcommittee before which he was subpoenaed, that he was unable to produce. McPhaul recognizes, even under these circumstances, that the government must make a prima facie case at the contempt hearing. Nowhere in the instant proceedings has the existence of documents been established - not by evidence nor by judicial determination. The existence of the documents requested was denied in McAnlis' answer to the petition, and the government has not come forward in these proceedings to make its prima facie case thereby shifting the burden to McAnlis to PROVE non-existence.

In Hankins, the existence of documents was proven at the evidentiary hearing. This fact has no application here since there was no true evidentiary hearing. Even had McAnlis raised the defense at the hearing of inability

to produce, no burden could have shifted to McAnlis because no prior determination of existence of documents was established.

The discussion now turns to the trial court's denying McAnlis assistance of counsel at the contempt proceedings. The panel (at 337, h.n. 9-10) states:

> "We do not dispute McAnlis' right to counsel at the contempt proceeding because imprisonment is a possibility. A review of the facts, however, compels this court to hold McAnlis waived his right to counsel."

The panel, for once, relates some facts to support its opinion - McAnlis had told the trial court on February 17, 1982, that he did not want to pay for an attorney.

At the February 17 proceeding, in response to the court's query as to why McAnlis did not have an attorney, McAnlis replied that he did not care to go to the expense and that he had not had an opportunity to interview any attorneys who were familiar with the issues he was raising. At this time, the proceedings were just starting and no prospect of imprisonment was

imminent. At the contempt hearing, could one not infer that McAnlis recognized that he had reached a point where his lack of knowledge and inexperience in courtroom procedures might be fatal? Under these circumstances, can one casual comment made at an earlier hearing be rightfully construed as a waiver for all time of his right to counsel? This court has held on several occasions:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested . ." Re Savin, 131 US 267; Cooke v. US, 267 US at 537; Harris v. US, 382 US at 165.

One final point concerning a misapplication of law in the decision. The panel relies upon US v Powell, supra at 57-58, and US v. SE First Nat. Bank of Miami Springs, 655 F2d 661, 664 as its authority for holding that the IRS had met its burden of showing that the Powell elements of good faith had been met. The panel does not state the

facts upon which it relies, but presumably the panel refers to the agent's declaration. In Powell, however, the government met its burden of showing proper civil purpose by testimony of the agent at the evidentiary hearing. In SE First, like Powell a third party case, the court held that the agent's affidavit alone was sufficient because no facts were alleged in support of the intervenor's denials. Nor could they be alleged, because all of the facts were in the hands of the government, the defense being that of sole criminal purpose. In this case, McAnlis made factual allegations in support of his denial that the administrative steps had not been followed, even identifying the missing jurisdictional step described in section 6001. The facts of Powell and SE do not apply here. The government did not establish its prima facie case by testimony. At the very least, therefore, the usual course of judicial proceedings would require a judicial determination that 6001 did not describe a step. None was made.

Petitioner apologizes for his long, wordy argument, but in view of the serious nature of his allegations, that of prejudice on the part of a panel of the Eleventh Circuit Court of Appeals, petitioner believed that a complete statement of his argument was necessary.

Petitioner stands upon the record. He alleges that the panel's tactics, numerous errors of fact, misapplications of law and arbitrary holdings unexplained as to law and/or facts, plus the panel's scandalous and irrelevant language, constitutes a prima facie case of prejudice influencing a decision harmful to petitioner.

At the very least, the panel's decision departs from the usual and accepted course of appellate proceedings wherein facts are carefully identified, law carefully applied, and reason and logic prevails in the published decisions.

Petitioner further alleges that the panel erred in not striking the government's brief with its scandalous language.

As a final consideration, petitioner alleges that the trial court abused its discretion when it refused to grant relief from contempt after McAnlis appeared before the IRS on July 19, 1983, and the agent refused to conduct a conference.

This question can fairly be included under the issue of departure from accepted and usual procedures.

The issue was raised on appeal but was ignored by the appellate panel.

CONCLUSION

Upon the record of the case and upon the cause for granting the writ, the cause for redress, and the argument given herein, the petitioner, Theodore M. McAnlis, appearing in his own proper person, requests that a writ of certiorari issue to review the judgement of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Theodore M. McAnlis
1918 Ascott Road
N Palm Beach, FL 33408
305-626-3212

Dated April 20, 1984. In his own proper person.

PROOF OF SERVICE

I hereby certify that I have served, by first-class mail, postage prepaid, three copies of the foregoing petition, upon the

Solicitor General of the United States
Department of Justice
Washington, DC 20530

on the date set forth below.

Theodore M. McAnlis

Affirmed before me on this

___ day of April, 1984.

Notary Public

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APRIL 5, 1988

UNITED STATES of America and S. Lee Rabney, Revenue Officer of the Internal Revenue Service, Plaintiffs-Appellees,

v.

Theodore M. McANLIS, Defendant-Appellant.

Nos. 82-5543, 82-5750.

United States Court of Appeals, Eleventh Circuit.

Dec. 12, 1983.

Taxpayer appealed from two orders issued by the United States District Court for the Southern District of Florida, James C. Paine, J., enforcing an Internal Revenue Service summons and finding taxpayer in civil contempt for failing to produce information. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) enforcement of summons was proper, and (2) where taxpayer did not comply with Internal Revenue Service summons enforced by district court, and taxpayer did not produce any evidence concerning his lack of possession or control of information sought by IRS, taxpayer was

properly held in contempt.

Affirmed.

1. Internal Revenue - 4512

In a petition for enforcement of a summons, the Internal Revenue Service need only make a preliminary showing that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Internal Revenue Code have been followed. 26 U.S.C.A. § 7602(a)(1,2).

2. Internal Revenue - 4512

Once the Internal Revenue Service fulfills initial burden of showing a good-faith issuance of summons, burden then shifts to taxpayer to prove the IRS failed to meet its burden or that the enforcement of the summons constitutes an abuse of the court's process. 26 U.S.C.A. § 7602(a)(1,2).

3. Internal Revenue - 4513

Taxpayer failed to establish bad faith on

part of IRS in issuing summons, or that enforcement of summons constituted an abuse of court's process. 26 U.S.C.A. § 7602(a)(1,2).

4. Internal Revenue - 4505

Where taxpayer failed to file any tax returns for three years, so that Internal Revenue Service might legitimately believe taxpayer was liable for payment of taxes, issuance of summons to taxpayer prior to establishment of tax liability was proper. 26 U.S.C.A. §§ 7601(a), 7602(a)(1,2).

5. Internal Revenue - 4508

Compliance with the Privacy Act is not a prerequisite to enforcement of an Internal Revenue Service summons. 5 U.S.C.A. §§ 552a, 552a (e)(3); 26 U.S.C.A. § 7602(a)(1,2).

6. Federal Courts - 893

Trial court's initiation of contempt proceedings for taxpayer's failure to comply with its enforcement of Internal Revenue Service summons constituted harmless error.

7. Internal Revenue - 4516

In a contempt hearing, alleged contemnor has

burden of proving inability to produce requested information.

8. Internal Revenue - 4516

Taxpayer's affidavit stating that he had difficulty comprehending difference between matters of fact and conclusions of law but containing no evidence of inability to produce summoned information failed to fulfill burden of proving inability to produce requested information, so that district court's order holding taxpayer in civil contempt for failure to comply with Internal Revenue Service summons was not error. 26 U.S.C.A. § 7602(a)(1,2).

9. Federal Civil Procedure - 1951

Right to counsel exists if litigant may lose his physical liberty if he loses litigation. U.S.C.A. Const.Amend. 6.

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10. Internal Revenue - 4516

District court did not deny taxpayer his right to counsel by rejecting his request for a continuance of civil contempt proceeding so he could obtain counsel for proceeding, which had been

initiated by court upon taxpayer's failure to comply with its enforcement of Internal Revenue Service summons where facts suggested that taxpayer requested continuance to delay proceedings.

11.Contempt - 55

To have sufficient notice of a contempt hearing, an individual needs adequate notice and time for preparation.

12.Internal Revenue - 4516

Taxpayer had adequate notice and time for preparation of his defense in civil contempt proceeding initiated by district court upon taxpayer's failure to comply with its enforcement of Internal Revenue Service summons.

13.Internal Revenue - 4516

Once a trial court enforces an Internal Revenue Service summons, an individual who does not comply with summons is properly held in contempt unless he produces evidence showing his lack of possession or control or information sought by summons.

14.Internal Revenue - 4516

Where taxpayer did not comply with Internal

Revenue Service summons enforced by district court, and taxpayer did not produce any evidence concerning his lack of possession or control of information sought by IRS, taxpayer was properly held in contempt.

Theodore M. McAnlis, pro se.

Stanley Marcus, U.S. Atty., Marc Fagelson, Asst. U.S. Atty., Miami, Fla., Michael L. Paupp, Appellate Sect., Glenn L. Archer, Jr., Charles E. Brookhart, Jo-Ann Horn, Tax Div., Dept. of Justice, Washington, D.C., for plaintiffs-appellees.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

In this case we determine whether the district court was correct in enforcing an Internal Revenue Service summons and holding the taxpayer in civil contempt. We affirm.

The appellant, Theodore M. McAnlis, appeals

two orders issued by the United States District Court for the Southern District of Florida. First, McAnlis appeals the order of April 12, 1982, enforcing an Internal Revenue Service (IRS) summons ordering McAnlis to produce documents reflecting his income for the years 1977, 1978, and 1979. Second, he appeals the district court's order of April 26, 1982, finding him in civil contempt for failing to produce the information. Finding the trial court's orders correct, we affirm.

On July 1, 1981, the Internal Revenue Service issued a summons to McAnlis directing him to produce records relevant to income tax liability for the years 1977, 1978 and 1979. On March 2, 1982, the trial court ordered McAnlis, who had consistently refused to produce the documents, to appear at the IRS offices on March 30, 1982, and produce the requested information. The trial court also directed McAnlis to appear in court on April 9, 1982, if he failed to present the information on March 30. McAnlis appeared at the IRS offices on March 30, but failed to

bring the requested records. The trial court, therefore on April 9, enforced the summons and ordered McAnlis to appear before the IRS on April 16, 1982, and produce the information or show cause why he should not be held in contempt. On April 22, the trial court held McAnlis in civil contempt because he had failed to produce the required information or explain his failure to do so on April 16.

I. The Trial Court's Enforcement of the Internal Revenue Service Summons

McAnlis raises six arguments concerning enforcement of the summons: (1) the court abused its discretion by failing to determine

that his letter to the IRS on July 9, 1981, challenging the validity of the summons was an appearance by him sufficient to shift the burden to the government to reject his challenge to the summons; (2) the IRS did not have a right to summon his records, as it had no basis on which to assume he is a person liable to pay taxes; (3) the IRS must prove the existence of tax

liability prior to issuance of any summons; (4) the IRS did not comply with the disclosure provisions of the Privacy Act. 5 U.S.C.A. § 552a (e)(3); (5) the IRS violated the fourth amendment; and (6) the IRS did not exhaust its administrative remedies.

[1,2] McAnlis's first contention lacks merit. In a petition for enforcement of a summons, the IRS need only make a preliminary showing, "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." United States v. Powell, 379 U.S. 48,57-58, 85 S.Ct. 248, 254-55, 13 L.Ed.2d 112 (1964). See also United States v. LaSalle National Bank, 437 U.S. 298, 313, 98 S.Ct. 2357, 2366, 57 L.Ed. 2d 221 (1978). Once the IRS fulfills this initial burden of showing a good-faith issuance of the summons, the burden then shifts to the taxpayer to prove the IRS failed to meet its burden

or that the enforcement of the summons constitutes an abuse of the court's process. Powell at 58, 85 S.Ct. at 255; United States v. Southeast First National Bank of Miami Springs, 655 F.2d 661, 664 (5th Cir.1981).

[3] In this case, the IRS has fulfilled its initial burden. McAnlis, however, has not met his burden. His letter of July 9, 1981, fails to establish bad faith on the part of IRS, or that enforcement of the summons constitutes an abuse of the court's process. The letter contains various assertions detailing the procedural deficiencies of the summons, but does not exhibit any evidence rebutting the IRS's claims.

[4] McAnlis's second and third contentions also are frivolous. The IRS had a basis upon which to assume McAnlis was liable to pay taxes. McAnlis's failure to file income tax returns for three years provided the basis. The IRS was complying with its statutory duty in issuing the summons after McAnlis's failure to file his returns. 26 U.S.C.A. § 7602(a)(1),(2).[1] The IRS, moreover, is not required to establish

tax liability prior to issuance of a summons. The agency has a statutory duty to inquire after persons who may be liable for the payment of taxes. 26 U.S.C.A. § 7601(a).[2] Since McAnlis failed to file any tax returns for three years, the Internal Revenue Service legitimately believed he might be liable for payment of taxes. Issuance of the sum-

mons prior to the establishment of tax liability, therefore, was proper. The agency was fulfilling its statutory duty. Donaldson v. United States, 400 U.S. 517, 523-24, 91 S.Ct. 534, 538-39, 27 L.Ed.2d 580 (1971); United States v. Harris, 628 F.2d 875, 878 (5th Cir.1980).

[5] McAnlis's remaining contentions lack substance. Compliance with 5 U.S.C.A. § 552a(e)(3), the Privacy Act, is not a prerequisite to enforcement of an IRS summons. United States v. Wills, 475 F.Supp. 492, 494 (M.D.Fla.1979). McAnlis, moreover, has suffered no prejudice in failing to receive a Privacy Act notice. Enforcement of the summons does not violate

McAnlis's fourth amendment rights. As long as the IRS complies with the Powell requirements, it will not violate the summoned party's fourth amendment rights. United States v. Roundtree, 420 F.2d 845, 847-50 (5th Cir.1969). In this case, the IRS fulfilled the Powell requirements. The IRS exhausted all administrative remedies. Enforcement of the summons, therefore, does not violate the exhaustion of remedies doctrine.

II. The Court's Order Holding McAnlis in Civil Contempt

McAnlis contends the trial court erred in holding him in contempt. (1) McAnlis argues the court erred in initiating contempt proceedings on its own motion. (2) McAnlis contends his affidavit was sufficient to purge himself of contempt. (3) McAnlis claims the trial court denied him his right to counsel by rejecting his request for a continuance so he could obtain counsel for the contempt proceeding. (4) McAnlis argues that he did not have a fair opportunity to produce a defense; and (5) McAnlis claims the contempt charge was based on insuffi-

cient evidence. After a review of the record, we find McAnlis's arguments meritless.

[6-8] McAnlis suffered no prejudice as a result of the trial court's initiation of contempt proceedings on its own motion. The trial court's action constituted harmless error. McAnlis's affidavit was insufficient to purge him of the contempt charge. In a contempt hearing, the alleged contemnor has the burden of proving inability to produce the requested information. McPhaul v. United States, 364 U.S. 372, 379, 81 S.Ct. 138, 142, 5 L.Ed.2d 136 (1960); United States v. Hankins, 565 F.2d 1344, 1351-52 (5th Cir.), opinion clarified and reh'g denied, 581 F.2d 431 (5th Cir.1978), cert. denied, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979). McAnlis's affidavit states that he has difficulty comprehending the difference between matters of fact and conclusions of law; but contains no evidence of his inability to produce the information. This affidavit fails to fulfill his burden of proving inability to produce the requested information.

[9,10] The right to counsel exists if the litigant may lose his physical liberty if he loses the litigation. Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 25, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981). We do not dispute McAnlis's right to counsel at the contempt proceeding because imprisonment is a possibility. A review of the facts, however, compels this court to hold McAnlis waived his right to counsel. On February 17, 1982, McAnlis explained to the trial court that he did not want to pay for an attorney. Subsequently, at the contempt hearing on April 22, McAnlis requested that the trial court grant a continuance so he could obtain counsel. The facts suggest that McAnlis requested the continuance to delay the proceedings.

[11,12] The notice requirements of criminal contempt proceedings also apply to civil contempt proceedings. Brown v. Braddick, 595 F.2d 961, 966, n. 7 (5th Cir.1979). To have sufficient notice of a contempt hearing, an indivi-

dual needs adequate notice and time for preparation. In Re Brummit, 608 F.2d 640, 642-43 (5th Cir.1979), cert. denied, 447 U.S. 907, 100 S.Ct. 2990, 64 L.Ed.2d 856 (1980); In Re Grand Jury Proceedings, 559 F.2d 234 (5th Cir. 1977), cert. denied, 434 U.S. 1062, 98 S.Ct. 1234, 55 L.Ed.2d 762 (1978). After reviewing the facts, we find that McAnlis had adequate

notice and time for preparation of his defense. The trial court, therefore, gave him sufficient notice of the contempt proceedings.

[13,14] The contempt charge was based on sufficient evidence. Once a trial court enforces an IRS summons, an individual who does not comply with the summons is properly held in contempt unless he produces evidence showing his lack of possession or control of the information sought by the summons. See United States v. Hankins at 1351-52. Since McAnlis did not comply with the summons enforced by the district court, he was properly held in contempt because he had not produced any evidence

concerning his lack of possession or control of the information sought by the Internal Revenue Service.

III. Conclusion

We affirm the trial court's orders. The trial court acted properly in enforcing the summons and holding McAnlis in contempt.

AFFIRMED.

Footnotes:

1. Title 26, U.S.C.A. § 7602(a)(1),(2) provides in pertinent part:

> (a) Authority to summon, etc. - for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized:
>
> (1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named

in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

2. Title 26, U.S.C.A. § 7601(a) provides:

(a) General rule. - The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO. 82-5543

UNITED STATES OF AMERICA and S. LEE
RABNEY, Revenue Officer of the
Internal Revenue Service,
Plaintiffs-Appellees,
v.
THEODORE M. McANLIS,
Defendant-Appellant.

CASE NO. 82-5750

UNITED STATES OF AMERICA and S. LEE
RABNEY, Revenue Officer of the
Internal Revenue Service,
Plaintiffs-Appellees,
v.
THEODORE M. McANLIS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC (Opinion December 12, 11 Cir.,
1984, _____F.2d_____).

FILED: JANUARY 24, 1984

Before RONEY, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ JOSEPH W. HATCHETT
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 81-8418-CIV-JCP

UNITED STATES OF AMERICA and S. LEE RABNEY, Revenue Officer of the Internal Revenue Service,
Petitioners,
v.
THEODORE M. McANLIS,
Respondent.

ORDER TO APPEAR WITH DOCUMENTS BEFORE THE IRS OR TO SHOW CAUSE WHY RESPONDENT SHOULD NOT BE HELD IN CIVIL CONTEMPT

FILED: APRIL 12, 1982

THIS ORDER is being issued at the conclusion of an Order to Show Cause hearing and an adversary hearing conducted by the Court on Friday, April 9, 1982, and reflects the substance of the oral order of the Court made a part of the record in those combined proceedings.

The Court makes the following findings:

1. The record of this case, including, but not limited to, the evidence heard by this Court on April 9, 1982, fails to support the conclusion that either the issuance of a summons or the attendant investigation by the Internal Revenue Service, of Theodore M. McAnlis, was motivated

by bad faith, "institutional" or individual in nature; nor does it support the conclusion that the acts of the Internal Revenue or its agents were performed for the purpose of criminal investigation or prosecution of Theodore M. McAnlis.

2. Furthermore, the evidence fails to indicate the existence of either harassment or intimidation directed toward Theodore M. McAnlis on the part of the Internal Revenue Service or the government.

3. The procedural attacks asserted by Theodore M. McAnlis against the Internal Revenue Summons served upon him are hereby rejected by this Court.

4. The Respondent, Theodore M. McAnlis, has been accorded full and fair opportunity to raise those procedural challenges and those constitutional challenges involving due process rights which he wished to address.

The Respondent, Theodore M. McAnlis, is therefore ordered to appear at the office of the Internal Revenue Service on April 16, 1982 at 12:00 noon, and to produce at that time the documents and records referred to in the summons issued on July 1, 1981.

IT IS FURTHER ORDERED that, if Theodore M. McAnlis does not appear at the office of the Internal Revenue Service on April 16, 1982, at the appointed time and with the required records and documents, that he is ordered to appear before this Court at 1:00 p.m. on April 16, 1982 to show cause why he should not be held in civil contempt of this Court's Order pursuant to the Internal Revenue Service's summons requirements.

IT IS FURTHER ORDERED that, absent a showing of cause demonstrating that he should not be held in contempt, Theodore M. McAnlis shall be held so at that time.

DONE and ORDERED this 12th day of April, 1982, in West Palm Beach, Florida.

/s/ JAMES C. PAINE
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 81-8418-CIV-JCP

UNITED STATES OF AMERICA and S. LEE RABNEY, Revenue Officer of the Internal Revenue Service,
Petitioners,
v.
THEODORE M. McANLIS,
Respondent.

ORDER FINDING RESPONDENT IN CIVIL CONTEMPT and IMPOSITION OF SANCTION

FILED: APRIL 26, 1982

THIS CAUSE came before the Court for a hearing, pursuant to the Court's Order to Show Cause why the respondent, Theodore M. McAnlis, should not be held in civil contempt by reason of his failure to appear at the office of the Internal Revenue Service and produce for examination, pertinent books, records, papers and other data pursuant to a summons originally issued by Internal Revenue officer S. Lee Rabney on July 1, 1981.

This appearance and production of documents was to have been made on Thursday, April 22, 1982 at twelve noon at the West Palm Beach office of the Internal Revenue Service.

The hearing conducted by the Court commenced at 2:00 p.m. on April 22, 1982. At that hearing both S. Lee Rabney, represented by the Government, and Theodore M. McAnlis, appearing pro se, testified as to what occurred on that same day at the time of the scheduled appearance by Mr. McAnlis.

At the conclusion of their testimony, the Court found Mr. McAnlis guilty of civil contempt for his repeated failure to comply with the Court's Orders with regard to the terms of the Internal Revenue Summons.

Pursuant to this finding of civil contempt, the Court hereby orders that the following sanctions be imposed:

1. Theodore M. McAnlis, the respondent in the above-styled action, shall pay $50.00 (fifty dollars) per day, $250.00 (two hundred fifty dollars) per week, such latter sum representing a five-day work week and computed on that basis;

2. This amount shall be taxed as effective April 23rd, through April 29, 1982 inclusive;

3. This fifty dollar per day, two hundred fifty dollars per week shall represent each day upon which Theodore M. McAnlis fails, within the period set forth above, to appear and to produce in good

faith the pertinent books, records, papers, and other data required by the Internal Revenue Summons;

4. The sum due and owing shall be made payable to the order of the United States Government at the West Palm Beach office of the Internal Revenue Service on Thursday, April 29, 1982.

5. Should the respondent, Theodore M. McAnlis, continue to fail to comply with the Court's Order and thereby remain in civil contempt after April 29, 1982, or if the total amount or any portion of the fine due and owing for the period of April 23rd through April 29, 1982 inclusive, is not paid, the respondent, Theodore M. McAnlis, is ordered to be arrested and to remain incarcerated until and unless he purges himself of the civil contempt in which he is held, by appearing before the officer of the Internal Revenue and producing for examination the pertinent books, records, papers and data.

The Court notes that the respondent, Theodore M. McAnlis, filed a Request for Clarification of this Court's Order finding him in civil contempt. A study of this request reveals that the Court at the April 22, 1982 hearing addressed the first question raised at this request. As to the remaining three questions, they constitute requests for an advisory opinion as to each, and as such, cannot be addressed by the Court.

DONE and ORDERED this 24th day of April, 1982, in West Palm Beach, Florida.

/s/ JAMES C. PAINE
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 81-8418-CIV-JCP

UNITED STATES OF AMERICA and S. LEE RABNEY, Revenue Officer for the Internal Revenue Service,
Petitioners,
v.
THEODORE M. McANLIS,
Respondent.

ORDER DENYING RELIEF FROM BEING HELD IN CIVIL CONTEMPT

FILED: AUGUST 17, 1982

THIS CAUSE is before the Court on a motion for relief from order finding respondent, Theodore M. McAnlis, in civil contempt, filed on July 21, 1982 (Docket Entry #51) by the respondent.

The Court will deny the instant motion. It does not appear that any of the acts necessary to purge the contempt in which Mr. McAnlis is currently held, have been performed by him. However, the Court expresses concern that in the event the respondent does attempt to perform the requisite acts, specifically, if he does bring with him, in order to produce, the requisite books, records, documents and other materials required by the IRS summons, Mr. McAnlis be unfettered in presenting

both himself and his materials, and be accorded basic courtesy by the IRS where he demonstrates by his conduct that is attempting in good faith to comply with this Court's order and thereby purge himself of the civil contempt in which he is currently held.

ORDERED and ADJUDGED that Theodore M. McAnlis' motion for relief from this Court's Order holding him in civil contempt is DENIED.

DONE and ORDERED this 17th day of August, 1982, in West Palm Beach, Florida.

/s/ JAMES C. PAINE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NOS. 82-5543
82-5750
D. C. Docket No. 81-08418

UNITED STATES OF AMERICA and S. LEE RABNEY, Revenue Officer of the Internal Revenue Service,
Plaintiffs-Appellees,

v.

THEODORE M. McANLIS,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ISSUED AS MANDATE: MARCH 26, 1984

Before RONEY, HATCHETT and ANDERSON, Circuit Judges.

JUDGMENT:

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the April 12 and April 26, 1982, orders of the District Court appealed from in this cause be, and the same is hereby AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

ENTERED FOR THE COURT:

December 12, 1983
Spencer D. Mercer, Cle

By: Signature unintelligible
Deputy Clerk

AO 82
(Rev. 8/80)

ORIGINAL

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT

for the

SOUTHERN DISTRICT OF FLORIDA

116039

at West Palm Beach

RECEIVED FROM Theodore M. McAnlis

U.S.A. etc vs Theodore M. McAnlis

Account Code

100	DEPOSIT FUND
101	Trustee Fees
102	Restitution
200	REGISTRY FUND
201	Cash Bail
202	Land Condemnation
	GENERAL AND SPECIAL FUND
310	Immigration Fees
320	Attorney Admission Fee
330	Filing Fees
331	Civil Cases
332	Writ of Habeas Corpus
333	Appeals
334	Bankruptcy Cases (Clerk's Fee)
340	Sale of Publications
350	Copy Fees
360	Miscellaneous Fees
380	Recoveries of Costs
	FINES, PENALTIES AND FORFEITURES
410	Agricultural Laws
420	Economic and Stabilization Laws
430	Immigration and Labor Laws
440	Customs, Commerce and Anti-Trust Laws
450	Narcotics, Prohibition and Alcohol Laws
460	Forfeitures of Unclaimed Money and Property
470	Mining Enforcement and Safety Administration
480	Internal Revenue Service (Criminal Fines)
490	Collateral Forfeiture (CVB)
500	Appearance Bond Forfeitures and Other Fines, Penalties or Forfeitures Not Otherwise Classified

ACCOUNT	AMOUNT
480	250 00
TOTAL	$250.00

Case Number or Other Reference

81-8418-CIV-JCP

Civil ~~Complaint~~ Contempt

DATE	Cash	Check	M.O.
4/29/1982		✓	X

DEPUTY CLERK

Appendix D

END OF DOCKET